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Ad Hoc Committee on the Scope of Legal Protection under the Convention on the Safety of United Nations and Associated Personnel
11-15 April 2005

Draft report

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I. Introduction

1. The fourth session of the Ad Hoc Committee on the Scope of Legal Protection under the Convention on the Safety of United Nations and Associated Personnel, established by the General Assembly in its resolution 56/89 of 12 December 2001, was reconvened pursuant to paragraph 11 of General Assembly resolution 59/47 of 2 December 2004, with a mandate to expand the scope of the legal protection under the Convention on the Safety of United Nations and Associated Personnel, including, inter alia, by means of a legal instrument. The Ad Hoc Committee met at United Nations Headquarters from 11 to 15 April 2005.

2. In accordance with paragraph 7 of resolution 56/89, the Ad Hoc Committee was open to all States Members of the United Nations or members of the specialized agencies or of the International Atomic Energy Agency. In addition, pursuant to paragraph 8 of that resolution, the Secretary-General invited the International Committee of the Red Cross to participate as an observer in the deliberations of the Ad Hoc Committee.

3. The Chairman of the Ad Hoc Committee, Christian Wenaweser (Liechtenstein), opened the session of the Ad Hoc Committee.

4. At the 8th plenary meeting, on 11 April 2005, the Chairman informed the Ad Hoc Committee that Ricardo Luis Bocalandro (Argentina), Vice-Chairperson, was no longer available to serve in that capacity.

5. At its 9th plenary meeting, on 12 April 2005, the Ad Hoc Committee elected Gaile Ann Ramoutar (Trinidad and Tobago) to replace Ricardo Luis Bocalandro (Argentina) as Vice-Chairperson. The Bureau was thus composed of the following members:

Chairman:
Christian Wenaweser (Liechtenstein)

Vice-Chairpersons:
Mahmoud Hmoud (Jordan)
Metod Špaček (Slovakia)
Gaile Ann Ramoutar (Trinidad and Tobago)

Rapporteur:
Mahmoud Samy (Egypt)

6. Václav Mikulka, Director of the Codification Division of the Office of Legal Affairs, acted as Secretary of the Ad Hoc Committee. Mahnoush H. Arsanjani, Deputy Director of the Division, acted as Deputy Secretary of the Ad Hoc Committee and Secretary to its Working Group of the Whole. The Codification Division provided the substantive services for the Ad Hoc Committee and its Working Group.

7. At its 8th plenary meeting, the Ad Hoc Committee adopted the following agenda (A/AC.264/L.8):

1. Opening of the session.
2. Election of officers.
3. Adoption of the agenda.

4. Organization of work.

5. Expansion of the scope of the legal protection under the Convention on the Safety of United Nations and Associated Personnel, including, inter alia, by means of a legal instrument.

6. Adoption of the report.

8. The Ad Hoc Committee had before it General Assembly resolution 59/47, the report of the Ad Hoc Committee on the work of its third session,[1] the report of the Working Group of the Sixth Committee convened during the fifty-ninth session of the General Assembly (A/C.6/59/L.9) containing, inter alia, a text proposed by the Chairman on an instrument expanding the scope of legal protection under the Convention on the Safety of United Nations and Associated Personnel[2] and a revised proposal submitted by Costa Rica on the relationship between the Convention on the Safety of United Nations and Associated Personnel and international humanitarian law.[3] The Ad Hoc Committee also had before it the report of the Secretary-General (A/59/226) on the scope of legal protection under the Convention on the Safety of United Nations and Associated Personnel, as well as a proposal submitted for discussion by China, Japan, Jordan and New Zealand.[4]

II. Proceedings

9. At its 8th plenary meeting, the Ad Hoc Committee adopted its organization of work and decided to continue its deliberations in a Working Group of the Whole. The Working Group held five meetings, from 11 to 13 April 2005 and a series of informal consultations. In its discussions of issues before it, the Working Group proceeded on the basis of oral and written proposals by delegations.

10. At its 10th plenary meeting, on 15 April 2005, the Ad Hoc Committee adopted its report.

III. Discussions in the Working Group on measures to expand the scope of legal protection under the Convention on the Safety of United Nations and Associated Personnel

A. General comments

11. Delegations expressed their concern about the continued attacks on the United Nations and associated personnel, condemned such attacks as unjustifiable and unacceptable under any circumstances and called upon States to prevent attacks against the United Nations and associated personnel and to bring to justice the perpetrators of these crimes.

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[1] *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 52* (A/59/52).

[2] A/C.6/59/L.9, annex I.A.

[3] loc. cit., annex I.B. The text is also reproduced in *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 52* (A/59/52), annex B.

[4] A/AC.264/2005/DP.1 (see annex ...).

12. Delegations also expressed their concern that the 1994 Convention on the Safety of United Nations and Associated Personnel has not attained universal adherence and urged States that had not become parties to the Convention to consider doing so. Support was expressed for the continued efforts of the Secretary-General to include the key provisions of the Convention in the status-of-forces, status-of-mission and host country agreements.

13. A number of delegations also supported the speedy conclusion of an additional protocol to the Convention to expand the scope of the Convention to cover United Nations operations other than peacekeeping operations and to dispense with the requirement of the declaration of risk under the Convention. It was also observed that provisions of the protocol should clearly define its scope.

14. The Chairman's text contained in document A/C.6/59/L.9 was considered to be a good basis for further negotiations. The discussion paper submitted by the delegations of China, Japan, Jordan and New Zealand (A/AC.264/2005/DP.1) was welcomed as a good basis for further advancing the work of the Committee.

B. Comments on specific issues

15. While the Working Group proceeded in its work with the general understanding that "nothing was agreed until everything was agreed", it decided to focus its discussions on those articles of the Chairman's text that remained in brackets, namely the third and fourth preambular paragraphs as well as articles II and III. Against this background, the Working Group considered the proposal for discussion by China, Japan, Jordan and New Zealand, which addressed those outstanding issues.

Third preambular paragraph

16. In introducing the third preambular paragraph in document A/AC.264/2005/DP.1, one of the sponsor delegations explained that the paragraph was closely linked to paragraph 1 of article II and was intended — in an effort to bridge the divergent views reflected in the alternatives offered in article II of the Chairman's text — to clarify situations of particular risk relating to United Nations operations that would fall within the scope of the draft protocol. It was noted that the term "peacebuilding" had been introduced in the proposal because of its flexibility and because such operations, by their very nature, contained an element of risk. The wording within the brackets, "including in situations of destabilizing civil unrest, societal breakdown, conflict and transitional reconstruction", had been proposed in order to provide further guidance as to which operations constituted peacebuilding operations. It was stressed that these situations all contained an element of risk. It was also observed that the factual evidence of a particular situation, the terms of the status-of-forces, status-of-mission, host-country or other agreements related to the operation, the *travaux préparatoires* and the authorizing resolution would assist in clarifying whether a certain operation constituted peacebuilding. It was further clarified that peacebuilding should be seen as a process and that the term was intended to encompass operations undertaken in pre-conflict, in-conflict and post-conflict situations.

17. Several delegations, in expressing support for the proposed text, noted that they would have preferred the draft protocol to apply to all operations and to

dispense with the notion of risk entirely. However, they recognized that the term "peacebuilding" had been introduced as a compromise and served to bridge the divergent views reflected in the different alternatives presented under article II of the Chairman's text. While it was recognized that peacebuilding was an evolving term and might not offer absolute legal clarity, it was pointed out that it was not a new term and that it had been used within the context of the United Nations, including in particular in the context of the report of the Secretary-General, "An Agenda for Peace: Preventive Diplomacy, Peacemaking and Peace-keeping" (A/47/277-S/24111), and offered sufficient flexibility. It was also observed that as long as the element of risk was incorporated into the draft protocol, a certain ambiguity would remain, since risk was a subjective concept. It was recalled that several other legal instruments, including the 1994 Convention itself, also incorporated ambiguous terms. In this regard, several delegations pointed out that the listing of examples of situations that constituted peacebuilding was useful.

18. Some other delegations were of the view that peacebuilding was still an evolving concept and that it would be preferable to include a proper definition of the term to ensure legal certainty, which was essential for the implementation of the draft protocol. In this context, it was recalled that other bodies within the United Nations were discussing the concept of peacebuilding, including in particular in the context of the proposal by the Secretary-General to create an intergovernmental Peacebuilding Commission (A/59/2005, paras. 114-119) and that their work on a definition should be taken into account. It was further observed that, should the draft protocol not contain a proper definition of the term, Member States were likely to look at other United Nations documents for guidance. However, other delegations stressed that the draft protocol was a law enforcement instrument and that the work of other bodies might not necessarily be relevant for the purpose of the draft protocol. Thus, the Ad Hoc Committee should not be constrained by discussions elsewhere. In this context, it was suggested that it might be appropriate to clarify that the use of the term "peacebuilding" was limited to the application and implementation of the draft protocol. Some delegations expressed doubts regarding any attempt to define peacebuilding in the context of the draft protocol.

19. Several delegations expressed support for the interpretation that peacebuilding comprised operations undertaken in pre-conflict, in-conflict and post-conflict situations. The point was made that the 1994 Convention covered operations undertaken in peacemaking and peacekeeping situations and that the draft protocol should only address situations falling outside that scope. Furthermore, it was pointed out that the 1994 Convention itself, in its fourth preambular paragraph, already referred to peacebuilding among other efforts undertaken by the United Nations, such as preventive diplomacy, peacemaking, peacekeeping, and humanitarian and other operations. It was also recalled that reports of the Secretary-General had linked the concepts of preventive diplomacy, peacemaking, peacekeeping and peacebuilding and had stressed that the terms were interrelated. However, some other delegations expressed doubts regarding any interpretation that peacebuilding could cover operations in pre-conflict situations and pointed out that the listing of distinct activities in the fourth preambular paragraph of the 1994 Convention clearly indicated that such activities did not all fall under the concept of peacebuilding. The view was also expressed that, within the context of United Nations peacebuilding activities, only operations undertaken in post-conflict situations would be covered. Some delegations expressed preference for the third

preambular paragraph in the Chairman's text, which employed the terms "conflict and post-conflict situations".

20. Some delegations expressed concern regarding the use of the term "peacebuilding". They were of the opinion that the concept lacked legal clarity and that its interpretation depended on too many external factors. It was also pointed out that this might impede the universality of the 1994 Convention. Regarding the listing of examples of situations that constituted peacebuilding, it was noted that attempts to exemplify it would complicate the issue further. It was stressed that expressions like "situations of destabilizing civil unrest" or "societal breakdown" would themselves require definition. These delegations preferred to revert to the Chairman's text.

21. While a request for clarification regarding the term "emergency humanitarian assistance" was made, it was noted that the term already existed in the Chairman's text. A point was also made that a more precise definition of the expression "personnel engaged in United Nations operations" would be required.

Fourth preambular paragraph

22. Delegations expressed support for and underlined the importance of the fourth preambular paragraph, which was considered a key provision, since it conveyed a strong message from the international community to bring to justice those who commit attacks against the United Nations and associated personnel. The view was expressed that, too often, no legal action was taken against perpetrators of crimes against United Nations or associated personnel. They therefore supported the proposal, contained in document A/AC.264/2005/DP.1, to remove the square brackets around the Chairman's text. A suggestion was also made to delete, in the paragraph, the word "effective" qualifying "regime", in order to avoid including subjective elements in the text of the draft protocol.

Article II

23. One of the sponsor delegations, in introducing the elements of paragraph 1 of article II of its proposal, relating to the definition of United Nations operations, explained that the paragraph was intended to retain the notion of risk while expanding the scope of application of the 1994 Convention to United Nations operations that, by their nature, entailed risk. The paragraph described two situations that would fall within the expanded scope of the 1994 Convention, namely, (a) operations established for the purposes of delivering humanitarian, political or development assistance in peacebuilding; or (b) operations established for the purpose of delivering emergency humanitarian assistance. It was observed that with the clarification of the concept of "peacebuilding" in the third preambular paragraph no further elaboration was required in paragraph 1. The package consisted of the present formulation in paragraph 1 and the clarification in the preamble.

24. Regarding paragraph 2 of article II, it was noted that it retained the language contained in the second set of brackets in the corresponding article of the Chairman's text and provided that permanent United Nations offices were excluded from the scope of the draft protocol.

25. In the introduction of paragraph 3 of article II, it was clarified that, since the delivery of emergency humanitarian assistance did not in itself necessarily contain an element of risk, paragraph 3 provided that host States could decide not to apply the draft protocol to such operations in cases of natural disasters. By making the applicability of the draft protocol voluntary to such operations in natural disasters, the element of risk was maintained in determining the scope of the 1994 Convention.

26. Comments by delegations focused mainly on paragraph 3.

Paragraph 1

27. Commenting on the text of paragraph 1, the suggestion was made to align the text of paragraph 1 with the text used in the third preambular paragraph and to add the language "in areas other than peacebuilding" at the end of article II, paragraph 1.

28. Some delegations reiterated their support for alternatives A and B, respectively, of article II, paragraph 1, of the Chairman's text. In this context, it was also suggested that a fourth alternative should be added to reflect the concept of exceptional risk.

Paragraph 3

29. Several delegations expressed concern with regard to the possibility that a State might not apply the draft protocol to personnel who provided emergency assistance to that State in the event of natural disasters. It was observed that the rationale to provide an opt-out provision in an optional protocol concluded for the very purpose of expanding the scope of protection to a broader category of operations was unusual, and the view was expressed that such an approach was tantamount to an unfriendly act. It was also pointed out that, since chaos and the deterioration of law and order often arose as a consequence of natural disasters, such situations contained an element of risk and should be covered by the scope of the draft protocol. Moreover, there was doubt as to whether or not the draft protocol would apply to situations of complex disasters, for example, where a State was affected by both a natural disaster and a risky situation requiring peacebuilding activity. The question was also raised regarding the rationale for excluding natural disasters but not other kinds of disasters, such as epidemics or man-made disasters. A request for clarification as to whether the element of risk must be predominant for the draft protocol to apply in natural disaster situations was also made. These delegations expressed their preference for the deletion of paragraph 3. They nevertheless also recognized that its inclusion was important for other delegations and expressed a willingness to consider alternative language.

30. A point was also made that the paragraph would provide an extra burden upon States suffering from a natural disaster. The view was also expressed that the language contained in paragraph 3 seemed similar to that of a resolution of the Security Council rather than that of a treaty.

31. Concern was also expressed with regard to the terminology used in the paragraph. In particular, it was pointed out that the term "objection" had a specific meaning under the law of treaties and was therefore inappropriate in the context of paragraph 3. A point was also made that, as drafted, paragraph 3 would only apply

to emergency situations and not to non-emergency situations, something that might be difficult to distinguish in practice.

32. Those delegations that preferred the retention of paragraph 3 noted that the paragraph was necessary to reflect the reality that natural disasters also occurred in situations of minimal risk, for example, in States where there existed a stable social order. Therefore, personnel delivering emergency humanitarian assistance would be adequately protected in accordance with the domestic law of that State. The situation contemplated in paragraph 3 was in many ways similar to the situations excluded by paragraph 2.

33. Questions were also raised with regard to the mechanism by which a host State would object to the application of the draft protocol to the delivery of emergency humanitarian assistance in cases of natural disasters. In particular, a clarification was requested as to whether such an objection would be general and made at the time of signature or ratification, or on a case-by-case basis, and whether the declaration could be made after the emergency humanitarian assistance had already been provided. In this regard, several delegations expressed their support for allowing objection to be made on a case-by-case basis subsequent to a natural disaster and prior to the deployment of emergency assistance. A suggestion was made to use a mechanism similar to the one provided for in article 4 of the International Covenant on Civil and Political Rights, permitting States to derogate from certain obligations in times of emergency. Nevertheless, a point was also made that treaties usually provided for optional clauses in a general sense rather than on a case-by-case basis.

34. Following the discussions, the Working Group held some informal consultations on how to address some of the concerns expressed during the debate. As a result of those consultations some proposals were made that clarified that paragraph 3 was intended to apply on a case-by-case basis and that a declaration to exclude the application of the protocol to the delivery of emergency humanitarian assistance to cases of natural disasters had to be made subsequent to a natural disaster and prior to the deployment of such assistance.

35. Several delegations expressed support for the proposals and observed that they addressed the main concerns raised during the discussions with regard to paragraph 3. However, a suggestion was made to include language that would ensure that a declaration not to apply the draft protocol in the event of a natural disaster be of limited duration and revocable in the event a risky situation developed. A point was made that both proposals contained mechanisms that might be too elaborate for a State in which a natural disaster had occurred. In response to a question raised as to to whom a declaration would apply, several delegations expressed the view that such a declaration would only apply to the State making it and that other States Parties would still be obliged to apply the draft protocol to that particular situation. However, the point was made that that would create two separate legal regimes and that a declaration should exempt all States Parties from the obligation to apply the draft protocol.

Article III

36. In introducing the new proposal for article III, contained in document A/AC.264/2005/DP.1, one of the sponsors pointed out that no delegation had questioned the necessity of including such a draft article during last year's

discussions in the Working Group of the Sixth Committee, and that differences on this article were minimal and related to its wording. The sponsor further stated that the draft article addressed ways of applying article 8 of the Convention on the Safety of United Nations and Associated Personnel, and in the new version references to draft article 4 and transit and host States had been removed. Consequently, both transit States and host States could exercise their national jurisdictions over crimes committed by United Nations and associated personnel, provided that it did not violate their other obligations under international law. In response to queries on the last phrase of article III, the sponsor observed that other obligations under international law covered obligations arising out of both multilateral and bilateral agreements, including agreements concluded between States and the United Nations.

37. Some delegations considered the draft article a balanced text that gave assurances to the host and transit States to exercise their national jurisdictions, consistent with their other international obligations, with respect to United Nations and associated personnel. In their view, the draft article reflected the progress achieved in the negotiations. However, it was emphasized that United Nations and associated personnel expect to be protected when they are present in a host State, by its consent, and they are also expected to obey the local laws. In this regard, the view was expressed that there were instances in which United Nations personnel had not respected the law of the host State, as required under article 6 of the Convention, and that perhaps the importance of that article should be reflected in the protocol. The view was also expressed that the objective of the protocol under discussion was to supplement the Convention and not to amend it.

C. Consideration of the proposal by Costa Rica on the relationship between the Convention and international humanitarian law

38. The sponsor delegation, while refraining from reintroducing the revised text of its proposal as contained in annex I.B of the report of the Working Group, A/C.6/59/L.9, noted that the background and rationale were summarized in the previous reports of the Ad Hoc Committee (A/59/52) and the Working Group (A/C.6/58/L.16, A/C.6/59/L.9), as well as in the report of the Secretary-General (A/55/637), and stressed that its proposal was intended to address broad legal issues concerning the relationship between the Convention and international humanitarian law, which needed to be corrected in order to restore the balance between the two regimes.

39. In the main, the sponsor delegation focused on the procedure that could be followed in order to provide the necessary framework for addressing the problem, indicating that it would be grateful to receive the reactions of delegations to its suggestions on the procedure. The sponsor delegation noted that, procedurally, there were three possibilities, namely, (a) an amendment of the Convention; (b) an interpretative authoritative statement; and (c) an additional protocol, which would be elaborated in the context of an extended mandate of the Ad Hoc Committee.

40. In addressing each of the three options, the sponsor delegation noted that an amendment of the Convention would ensure the greatest legal clarity. While the Convention envisaged the possibility of a review meeting of States Parties under article 23 of the Convention, such an approach would have to be weighed against

the difficulties that may have to be confronted, were the substance of the Convention to be reopened, as well as the subsequent requirements for ratification.

41. Concerning the second option of an interpretative authoritative statement, the sponsor delegation noted that this was not without precedent. In 1996, the General Assembly had adopted a resolution to facilitate the interpretation of the 1951 Convention relating to the Status of Refugees. In the present context, such an interpretative statement could take the form of a paragraph in a preamble to the present draft protocol or could be dealt with separately.

42. With regard to the third option of preparing an additional protocol within the context of an extended mandate of the Ad Hoc Committee, the sponsor delegation noted that the drawback in such an approach was that the amending protocol would only apply to its parties and, as such, would not offer the necessary clarity and certainty in legal relations that an amendment to the Convention would provide.

43. Concerning the substance of the proposal, several delegations confirmed that there was great merit in considering the proposal by Costa Rica. Such a proposal would clarify the relationship between the Convention and international humanitarian law. This was particularly pertinent, since the Convention did not exclude the application of the Convention in respect of operations authorized under Chapter VI of the Charter of the United Nations. Thus, there existed a possibility in which personnel covered by the Convention would be engaged in hostilities that would be governed by international humanitarian law. It was observed that the proposal would make the position clearer than was now the case under the saving clause contained in article 20 of the Convention.

44. Some other delegations expressed objection to the proposal by Costa Rica. In their view, the proposal was contrary to contemporary trends in international law, in particular, the Rome Statute of the International Criminal Court, which provided, in the context of both international and non-international armed conflicts in articles 8(2)(b)(iii) and 8(2)(e)(iii), that attacks against personnel, installations, material, units or vehicles involved in humanitarian assistance or peacekeeping missions in accordance with the Charter of the United Nations constituted war crimes. Moreover, it was noted that the proposal would place additional obligations on peacekeepers, thus creating a grey area and bringing grave danger to their well-being.

45. It was also noted that the saving clause in article 20(a) of the Convention adequately covered the concerns of Costa Rica and there was no need for further clarification of the matter. Furthermore, the fact that the Convention did not cover enforcement action under Chapter VII of the Charter of the United Nations, in which any of the personnel were engaged as combatants against armed forces and to which the law of international armed conflict applied implicitly, meant that international humanitarian law was relevant in similar related situations.

46. In response to some of the comments, the sponsor delegation noted that, while article 20(a) of the Convention served as a saving clause, it was one-sided in favour of United Nations personnel. A better formulation would have been to provide that the Convention would not apply when international humanitarian law applied, as was the case in recent anti-terrorism instruments adopted by the General Assembly. While international law had indeed evolved, it provided a clearer delineation with regard to the relationship. For example, articles 8(2)(b)(iii) and 8(2)(e)(iii) of the

Rome Statute classify attacks against United Nations personnel, installations, material, units or vehicles involved in humanitarian assistance or peacekeeping missions in accordance with the Charter of the United Nations as war crimes, as long as those personnel and units are entitled to the protection given to civilians or civilian subjects under the international law of armed conflict. This caveat, which means that, if United Nations personnel were to take part in hostilities, they would be treated as combatants under international humanitarian law, is missing in the Convention.

47. Concerning the three options offered by Costa Rica, some delegations felt that the second option had merit, while other delegations preferred the third alternative of concluding a separate protocol on the matter. Some other delegations, however, noted that the issue was legally and technically complex. In this regard, several delegations pointed out that more time would be required to reflect upon the options. However, some delegations indicated that the matter should not be considered in the present draft optional protocol. On the other hand, the point was made that the understanding of the Committee to deal with the two issues separately was not intended to be construed as meaning that the draft protocol would not address questions concerning the relationship.

48. The observer representative of the International Committee of the Red Cross (ICRC) noted that the ICRC continues to consider that there are and might be situations where an overlap between the regimes under the Convention and international humanitarian law exist and where both regimes apply. Such situations include situations that are not taken into proper consideration by the exclusionary paragraph 2 of article 2 of the Convention or situations where it is or might not be clear whether the exclusion clause applies. The possible expansion of the scope of legal protection would increase such instances of overlap. Such overlap had consequences and, inter alia, undermined the underlying principles and philosophy of international humanitarian law, namely, equal rights and obligations of parties to a conflict, and would weaken instead of reinforcing the protection of United Nations and associated personnel. In this connection the question of relationship should be given due consideration by States, with a view to clarifying it in a way considered appropriate.

IV. Recommendation

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Annex

[Text[s] of proposals to be inserted]